

# Public Records

## BASIC PROVISION

The basic rule for open public records in Nebraska is found at Neb. Rev. Stat. ( 84-712. That statute provides: "Except as otherwise expressly provided by statute, all citizens of this state, and all other persons interested in the examination of the public records . . . are hereby fully empowered and authorized to (a) examine the same, and make memoranda, copies using their own copying or photocopying equipment . . . and abstracts therefrom, all free of charge, during the hours the respective offices may be kept open for the ordinary transaction of business and (b) except if federal copyright law otherwise provides, obtain copies of public records . . . during the hours the respective offices may be kept open for the ordinary transaction of business."

1. History. The basic language of this statute has been in effect since 1866. It was amended in 1961 to provide that the public may make memoranda and abstracts from public records. It was also amended in 2000 to provide for an express right for citizens and interested persons to obtain copies of public records.
2. Purpose. The purpose of this statute is "to guarantee that public government records are public." Introducer's Statement of Purpose for LB 505, 72nd Nebraska Legislature (1961). Under this statute, it was intended that all public records of the state, its counties, and its other political subdivisions should be open to inspection, except where the Legislature has otherwise provided that the record shall be confidential. Judiciary Committee Statement on LB 505, 72nd Nebraska Legislature (1961).
3. Neb. Rev. Stat. ( 25-1280 (1995) also provides that public officials must provide a certified copy of public records upon request and upon payment of the legal fees therefore.
4. Section 84-712 does not require a public agency to review documents and create abstracts or other lists, to answer questions or to create documents which do not otherwise exist. Op. Att'y Gen. No 94092 (November 22, 1994); Op. Att'y Gen. No. 94035 (May 11, 1994); Op. Att'y Gen. No. 87104 (October 27, 1987).
5. Both ( 84-712 and ( 84-712.01 state that public records may be reviewed by members of the public and copies obtained except where statutes expressly provide to the contrary.
6. Section 84-712 applies to citizens of Nebraska and "all other persons interested in the examination of public records."
7. Section 84-712 does not require any showing by a person requesting access to public records of the reason for his or her review of those records. As noted in *State ex rel. Sileven v. Spire*, 243 Neb. 451, 500 N.W.2d 179 (1993), Section 84-712 applies equally to all persons, without regard to the purpose for which the information is sought.

8. The Public Records Statutes authorizing the examination of public records at government offices do not require the State Department of Correctional Services to transport a prison inmate to the DCS office where food service contracts are located so that the inmate might examine those contracts. *Russell v. Clarke*, 15 Neb. App. 221, 724 N.W.2d 840 (Neb. Ct. App. 2006).

## **COPIES OF PUBLIC RECORDS**

Prior to 2000, the Public Records Statutes did not expressly provide that citizens and interested persons had a right to obtain copies of public records. That situation was changed with the passage of 2000 Neb. Laws LB 628. As noted above, citizens and interested persons are now authorized by statute to make copies of public records using their own copying or photocopying equipment, and to obtain copies of public records from public agencies unless federal copyright law provides otherwise.

1. Under ( 84-712 (2), copies of public records made by citizens or other persons using their own copying or photocopying equipment must be made on the premises of the custodian of the public records or at a location mutually agreed to by the requester and the custodian.
2. Section 84-712 (3) (a) states that a custodian of public records is required to make copies of public records only if the custodian has copying equipment reasonably available. That same section also states that copies of public records may be obtained in any form designated by the requester in which the public record is maintained or produced, including printouts, electronic data, discs, tapes and photocopies.
3. Section 84-712 (3)(c) provides that a public body or the custodian of a public record is not required by the Public Records Statutes to produce or generate any public record in a new or different form or format modified from that of the original public record.
4. Fees for Copies of Public Records. The custodian of a public record may charge a fee for providing copies of such record, and that fee shall not exceed the actual cost of making the copies available. ( 84-712(3)(b).

a. Section 84-712(3)(b) defines actual costs as follows:

i. For photocopies, the actual cost of making the copies available shall not exceed the amount of the reasonably calculated actual cost of the photocopies.

ii. For printouts of computerized data on paper, the actual cost of making the copies shall include the reasonably calculated actual cost of computer run time and the cost of materials for making the copy.

iii. For electronic data, the actual cost of making the copies available shall include the reasonably calculated actual cost of the computer run time, any necessary analysis and programming, and the production of the report in the form furnished to the requester.

b. State agencies which provide electronic access to public records through a gateway service must obtain approval of their fees for such access to records from the State Records Board under the appropriate statutes, and the actual cost of making copies of records available in that format may include the approved fee for the gateway service.

c. If copies of records requested under the Public Records Statutes are estimated by the custodian of those records to cost more than \$50, the custodian may require the requester to furnish a deposit prior to fulfilling the copy request. ( 84-712(3)(d).

d. The legislative history of LB 628 indicates that the actual cost charged by public bodies for making copies of public records available may include the actual cost of the staff time of the public employees involved in that process, including the time necessary to pull the records, separate out any portions of the records that may be kept confidential, copy the records and return them to the proper files. Floor Debate on LB 628, 96th Neb. Leg., 2nd Sess. 10051-10053 (Mar. 8, 2000)(Statement of Sen. Coordsen). In that regard, the Legislature deleted portions of the original bill which specifically provided that the actual cost of making copies of public records could not include the cost of salaries of public employees. Legislative Journal, 96th Neb. Leg., 2nd Sess. 757-758 (Feb. 22, 2000) and 836 (Feb. 28, 2000); Floor Debate on LB 628, 96th Neb. Leg., 2nd Sess. 10050 (March 8, 2000).

e. In Op. Att(y Gen. No. 01029 (August 2, 2001), the Attorney General indicated that the actual costs which may be charged for photocopies of public records include the cost of copy paper, toner, copy machine rental, etc., plus an appropriate amount for the staff time of public employees involved in locating the records, making copies and returning the records to the proper files, not to exceed the amount of time reasonably needed to perform those tasks in a particular case. In that same opinion, the Attorney General indicated that it was his enforcement policy not to question charges of up to 10 cents per page for making photocopies of public records for members of the public. While public officials could charge more than 10 cents a page for making photocopies of public records in a particular instance, they must be able to demonstrate, under the Attorney General(s enforcement policy, that the actual cost of making the records in that case, including a reasonable labor charge for the time of public employees involved, equaled or was greater than the fee being charged for the copies. As an example of his enforcement threshold with respect to charges for photocopies, the Attorney General stated, (. . . if half an hour were

reasonably required to locate and copy 50 pages and the hourly rate of the person making the copies is \$10 per hour, then a maximum charge of \$10 (50 copies x \$0.10 + \$5 for a half hour of time) would not be challenged by the Attorney General.( Op. Att'y Gen. No. 01029 at 2.

f. Under the Attorney General(s current enforcement policy, the Office of the Attorney General will not question copying charges of up to 25 cents per page for copies of public records in addition to the other allowable charges discussed in Op. Att'y Gen. No. 01029.

## **DEFINITION OF PUBLIC RECORD**

Neb. Rev. Stat. ( 84-712.01 defines public records for purposes of the public records statutes. Under that section, except where other statutes expressly provide that a record shall not be made public, public records are all records and documents, regardless of physical form, of or belonging to the state and its various political subdivisions, departments, boards, and commissions. Under this definition, public records are broadly defined, and the scope of the bodies covered is also wide. Data which is a public record in its original form remains so when maintained in a computer.

1. History. Prior to 1979, there was no definition of public record with respect to ( 84-712, and other statutory definitions and statements from case law in other contexts were used to provide a definition. See 1975-76 Rep. Att'y Gen. 289 (Opinion No. 208, dated March 18, 1976); 1963-64 Rep. Att'y Gen. 203 (Opinion No. 121, dated August 27, 1963). In 1979, LB 86 was passed specifically to provide a definition of public record for the public records statutes. See Introducer's Statement of Purpose, LB 86, 86th Nebraska Legislature, First Session (1979).
2. The intent of LB 86 in 1979 was to require that all documents of public bodies be public records unless another statute expressly provided otherwise or unless those documents fell under one of the exceptions listed later in the bill. [Those exceptions are codified at Neb. Rev. Stat. ( 84-712.05]. Hearing on the Government, Military and Veterans' Affairs Committee on LB 86, 86th Nebraska Legislature, Second Session (1979) at 4.
3. The Attorney General has considered the point in time when "draft" documents or work in progress become records and documents which are subject to disclosure under the Public Records Statutes. In Op. Att'y Gen. No. 91054 (June 17, 1991), the Attorney General indicated that this determination must be made on a case-by-case basis. Notes and drafts of documents within an agency which remain subject to approval by upper management and which have not been issued are preliminary materials which are not "records" or "documents." On the other hand, materials which have been through the formation process within an agency and have left the agency are more obviously "records" or "documents," even though they may require further approval and are arguably in "draft" form. The Attorney General has also informally indicated that

"briefing papers" which have been circulated to the members of a public body prior to a meeting of the body are not "drafts," but rather are public records subject to disclosure.

4. Records "of" or "belonging to" state agencies under ( 84-712.01 are those records "owned" by the agencies or those records for which the state agencies possess title or an ownership interest. Op. Att'y Gen. No. 97033 (June 8, 1997). The mere fact that a record is in the possession of a public officer or a public agency does not make it a public record of that officer or agency. Id. Conversely, public records need not be in the physical possession of an agency to be subject to disclosure under the Public Records Statutes by that agency. Id. The key question with respect to access to particular records is whether those records are records "of" or "belonging" to the agency in question. Id.
5. The Attorney General has indicated informally that the (custodian( of a particular public record is the public officer who, by virtue of his office, is the legal custodian for all papers, books and records of that office, including that particular record. Custody over a record requires supervision or control over the document, or legal responsibility for its care, keeping or guardianship.
6. Examples of items which are public records:
  - a. The numerical index of instruments affecting the title of real estate in the office of the county clerk. State v. Sovereign, 17 Neb. 173, 22 N.W. 353 (1885).
  - b. The fee book of the clerk of the district court. State v. Meeker, 19 Neb. 106, 26 N.W. 620 (1886).
  - c. The docket of a justice of the peace where judgments are recorded. State v. Elsworth, 61 Neb. 444, 85 N.W. 439 (1901).
  - d. Hunting and fishing permits. 1977-78 Rep. Att'y Gen. 30 (Opinion No. 20, dated February 14, 1977).
  - e. Records maintained by the Crime Victims' Reparations Board. 1979-80 Rep. Att'y Gen. 191 (Opinion No. 136, dated July 25, 1979).
  - f. Records of official actions taken by the State Tax Commissioner. 1979-80 Rep. Att'y Gen. 241 (Opinion No. 171, dated November 26, 1979).
  - g. Records maintained by a county in connection with a lottery. Op. Att'y Gen. No. 212 (June 8, 1984).
  - h. Applications for a Pardon become public records when they are filed with the Secretary of the Nebraska Board of Pardons. Op. Att'y Gen. No. 92030 (March 2, 1992).

i. Records maintained by a county agricultural society are subject to the public records statutes. Op. Att'y Gen. No. 91007 (January 29, 1991).

j. Applications for absentee ballots are public records and are open to examination until, following the canvass of votes cast, they are deposited in the office of the county clerk or election commissioner for safe keeping. Op. Att'y Gen. No. 90035 (October 4, 1992).

k. The list of uncashed state warrants maintained by the Nebraska State Treasurer constitutes a public record. Op. Att'y Gen. No. 95025 (March 31, 1995).

l. Completed Claim for Injury or Damage forms filed with the State Risk manager are public records. Op. Att'y Gen. No. 93068 (August 19, 1993).

m. Proposals in connection with Education Innovation Fund grants awarded by the Governor and the Excellence in Education Council are public records. Op. Att'y Gen. No. 94092 (November 22, 1994).

n. Institutional profiles along with preliminary and prioritized lists of educational institutions referred by the U.S. Department of Education to the Nebraska Coordinating Commission for Postsecondary Education acting as the State Postsecondary Education Review Entity under federal law are public records. Op. Att'y Gen. No. 94095 (November 28, 1994).

o. In Op. Att'y Gen. No. 94035 (May 11, 1994), the Attorney General indicated that records revealing the identities of applicants for positions with the Nebraska Department of Education, including the position of Commissioner of Education, are public records which should be made available to the public. That opinion also indicated that materials accompanying such applications including resumes, letters of recommendation, and so forth are public records to the extent that they are in the possession of the state agency. [Neb. Rev. Stat. ( 84-712.05 (15), passed as a part of LB 137 in 1999, affects the conclusion set out in that opinion. See ( E 4 o below.)]

p. Computer data bases, computer programs, and computer instructions, manipulations and routines collected, formulated and produced by the Nebraska Department of Education in accordance with the Tax Equity and Educational Opportunities Support Act are public records under the Public Records Statutes. Op. Att'y Gen. No. 96074 (November 13, 1996). On the other hand, computer "source files" or "dynamic application text files" which contain primarily alphanumeric characters, including punctuation and/or special characters used to control printing are not public records. Id.

q. The records of a court-appointed receiver which are directly related to the receivership are public records which are subject to the Public Records Statutes. Op. Att'y Gen. No. 97055 (October 16, 1997).

r. Reports by County Drug Law Enforcement and Education Fund Boards to the Auditor of Public Accounts under Neb. Rev. Stat. ( 28-1439.03 (1995) are public records under the Public Records Statutes. Op. Att'y Gen. No. 99034 (July 29, 1999). Those reports summarize the use of forfeiture funds during each year. However, the Auditor's working papers with respect to those reports are not subject to disclosure. Id.

s. The Attorney General has indicated informally that first reports of injury filed with the Workers' Compensation Court, with the exception of the portions of those reports containing an employer's unemployment insurance account number and any social security numbers, are public records.

t. Records of or belonging to the judicial department of state government, including briefs and legal memoranda, are public records under the Public Records Statutes. Op. Att'y Gen. No. 04030 (December 27, 2004). However, the Attorney General has also indicated that courts may take the position that any obligation which they have to produce records, including briefs and legal memoranda, under the Public Records Statutes is subject to the courts' supervisory power over their own records and files. Id.

7. Examples of other statutes which provide that certain public records shall be confidential and which apparently would control over ( 84-712:

a. Neb. Rev. Stat. ( 48-612 concerning employee information obtained from employers by the Department of Labor. 1973-74 Rep. Att'y Gen. 170 (Opinion No. 128, dated January 17, 1974).

b. 42 U.S.C. ( 405(c)(2)(C) concerning information regarding social security numbers. Op. Att'y Gen. No. 93042 (June 1, 1993); Op. Att'y Gen. No. 239 (December 10, 1984).

c. Neb. Rev. Stat. ( 77-4104(2)(d) concerning applications and supporting information for tax incentives under the Employment and Investment Growth Act. Op. Att'y Gen. No. 87093 (July 30, 1987).

d. Those statutes which are a part of the Nebraska Rules of Evidence which create evidentiary privilege may create an exception to the public records statutes. Evidentiary privilege is granted in Chapter 27, Article 5 of the Nebraska Statutes for several types of communications. Included, for example, are attorney-client communications, physician-patient communications and husband-wife communications.

8. Under Neb. Rev. Stat. ( 84-1215(2), members of the Legislature and other officials may offer their personal and political papers of public interest to the state archives for preservation subject to any reasonable restrictions concerning their use by other persons. Op. Att'y Gen. No. 92077 (June 4, 1992).

## **LIBERAL CONSTRUCTION FOR FISCAL RECORDS**

Section 84-712.01 provides that the public records statutes shall be liberally construed when the fiscal records of a public body are involved so that citizens shall have full access to information on the public finances of government.

## **EXCEPTIONS TO DISCLOSURE**

The public records statutes are not absolute, and they provide for exceptions to disclosure by express and special provisions. *Orr v. Knowles*, 215 Neb. 49, 337 N.W.2d 699 (1983).

1. Section 84-712.05 describes records which may be withheld from the public by their lawful custodian unless disclosed in open court, in an open administrative proceeding, an open meeting, or pursuant to the duties of the public body. Records have been (disclosed( in that context only when the public body has, in its official capacity, already made them available to the public. *State ex rel. Nebraska Health Care Association v. Dept. of Health and Human Services Finance and Support*, 255 Neb. 784, 587 N.W.2d 100 (1998). Also, the exceptions listed in ( 84-712.05 simply permit nondisclosure; they do not require confidentiality for those categories of records. *Burlington Northern Railroad Company v. Omaha Public power District*, 703 F. Supp. 826 (D. Neb. 1988); *aff'd Burlington Northern Railroad Company v. Omaha Public Power District*, 888 F.2d 1228 (8th Cir. 1989).
2. The initial exceptions to the public records statutes which became ( 84-712.05 were enumerated in LB 86, passed by the Legislature in 1979.
3. The Attorney General has concluded that the provisions of ( 84-712.05 do not create "exemptions" to the public records statutes, i.e., the various categories of records set out in that section are still "public records." However, even though they are public records, they may be kept confidential at the discretion of their custodian agency. Op. Att'y Gen. No. 94080 (October 14, 1994). The Attorney General has also concluded that § 84-712.05 applies to the public's right to access public records, and does not affect the right of the Legislature's Performance Audit Committee to review confidential records as a part of a performance audit. Op. Att'y Gen. No. 04022 (August 13, 2004).
4. The current version of ( 84-712.05 permits a custodian of public records to keep the following categories of documents confidential:



a. Personal information in records regarding a student, prospective student, or former student of any educational institution or exempt school that has effectuated an election not to meet state approval or accreditation requirements pursuant to section 79-1601, when such records are maintained by and in the possession of a public entity, other than routine directory information specified and made public consistent with 20 U.S.C. 1232 g, as such section existed on January 1, 2003. Under the federal statute, directory information is defined as: the student(s) name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.

b. Medical records, other than records of births and deaths and certain investigatory records discussed below, in any form concerning any person, records of elections not to be bound by the Nebraska Hospital Medical Liability Act under Neb. Rev. Stat. ( 44-2821, and patient safety work product under the Patient Safety Improvement Act.

i. The Attorney General has concluded that fiscal records kept by a county ambulance service are subject to examination, but that the names of patients and the types of services rendered to those patients are medical records which may be kept confidential. Op. Att'y Gen. No. 116, (July 22, 1985).

ii. Birth and death records should be made available to the public under the public records statutes. Op. Att'y Gen. No. 91004, (January 28, 1991); Op. Att'y Gen. No. 90039 (November 20, 1990). The federal Health Insurance Portability and Accountability Act of 1996 or (HIPPA) does not restrict the cause of death from being disclosed as a part of a death record, and death certificates which list the cause of death as a communicable disease may not be kept confidential under the Public Records Statutes. Op. Att'y Gen. No. 04018 (April 20, 2004).

iii. In Op. Att'y Gen. No. 91039 (May 16, 1991), the Attorney General discussed the confidentiality of a number of records maintained by the Nebraska Office of Risk Management including materials relating to Workers' Compensation claims, State Claims Board claims, Reports on Unsafe Conditions, and correspondence from the Attorney General's Office. The bulk of those documents could be kept confidential.

c. Trade secrets, academic and scientific research work in progress and unpublished, and other proprietary or commercial information which would give advantage to business competitors and serve no public purpose if released.

i. A trade secret under ( 84-712.05 is defined in Burlington Northern Railroad Company v. Omaha Public Power District, 703 F.Supp. 826 (D.Neb. 1988). However, that case preceded the effective date of the Nebraska Trade Secrets Act adopted in 1988. [Neb. Rev. Stat. (( 87-501 through to 87-507] That Act contains a definition of "trade secret" which could be the definition used in the future for purposes of Section 84-712.05(3). In addition, that Act contains some positive prohibitions upon the dissemination of trade secrets which may go beyond the provisions of the public records statutes.

ii. In Op. Att'y Gen. No. 92068 (May 7, 1992), the Attorney General discussed withholding records involving "proprietary or commercial information which would give advantage to business competitors and serve no public purpose if released." The Attorney General concluded that: (a) Section 84-712.05(3) does not impose any requirement of "substantial" competitive injury or advantage to make the exception from disclosure available, (b) a bare assertion by the provider of commercial information that such information is confidential is insufficient to justify nondisclosure, and (c) nondisclosure must be based upon a showing that a specified competitor may gain a demonstrated advantage by disclosure rather than a mere assertion that some unknown business competitor may gain some unspecified advantage. The Attorney General reaffirmed those requirements for assertion of the proprietary and commercial information exception to disclosure in Op. Att'y Gen. No. 97033 (June 8, 1997).

iii. The Attorney General has indicated informally that a study of Mexican American sentencing trends conducted for a state agency by a college professor which was in uncompleted form constituted academic or scientific research work which could be withheld from the public.

d. Records which represent the work product of an attorney and the public body involved which are related to preparation for litigation, labor negotiations or claims made by or against the public body, or records which are subject to the attorney/client evidentiary privilege.

e. Records developed or received by law enforcement agencies and other public bodies with duties of investigation or examination when the records are part of the examination, investigation, intelligence information, citizen complaints, informant identification, or information used in law enforcement training. Under LB 590 passed in 1993, and LB 1061 passed in 1994, this exception does not apply to investigatory records developed or received relating to the presence of and amount or concentration of alcohol or drugs in any body fluid of any person.

i. A public record is an investigatory record where: (1) the activity giving rise to the document sought is related to the duty of investigation or examination with which the public body is charged, and (2) the relationship between the investigation or examination and that public body(s) duty to investigate or examine supports a colorable claim of rationality. *State ex rel. Nebraska Health Care Association v. Dept. of Health and Human Services Finance and Support*, 255 Neb. 784, 587 N.W.2d 100 (1998). When a document is compiled ancillary to an agency(s) administrative function, then it is not protected from disclosure as an investigatory record. *Id.* However, when an inquiry by an administrative agency departs from the routine and focuses with special intensity of a particular party, an investigation is underway for purposes of the investigatory records exception to disclosure. *Id.*

ii. The Attorney General has concluded that the results of examinations conducted by the State Board of Examiners for Professional Engineers and Architects and files relating to certification of construction companies as Minority Business Enterprises are records which may be kept confidential under this section. *Op. Att'y Gen. No. 123* (June 10, 1983); *Op. Att'y Gen. No. 128* (July 6, 1983).

iii. In *State ex rel. Sileven v. Spire*, 243 Neb. 451, 500 N.W.2d 179 (1993), the Court considered whether the following records could be withheld under this provision: records in the possession of the Attorney General concerning an investigation and prosecution of violations of the Nebraska Political Accountability and Disclosure Act, records in the possession of the Attorney General concerning an investigation by the State Patrol into fraudulent business activities, and records in the possession of the Attorney General concerning an investigation by the Missouri Attorney General's office into fraudulent activities. The Court concluded that these various records fell

within the plain and ordinary meaning of ( 84-712.05(5), and could be kept confidential.

iv. In *Fourcloud v. City of Fremont*, 1993 WL 259351 (Neb. Ct. App. 1993)(Not approved for publication), the Nebraska Court of Appeals held that (offense reports( and (incident reports( which are public records under ( 29-3521 of the Nebraska Security, Privacy, and Dissemination of Criminal History Information Act, Neb. Rev. Stat. (( 29-209, 29-210, 29-3501 to 29-3528 and 81-1423 (1995, Cum. Supp. 2006), may still be withheld from the public if they are part of intelligence or investigative information under ( 84-712.05 (5). The public body in possession of such records has the burden to demonstrate that the records in question are intelligence or investigative information.

v. The Attorney General has indicated that tape recordings made by the Nebraska Equal Opportunity Commission as a part of an investigation of employment or housing discrimination could be kept confidential under ( 84-712.05 (5). Op. Att'y Gen. No. 94004 (January 11, 1994).

vi. Institutional profiles and preliminary lists of educational institutions referred by the U.S. Department of Education to the Nebraska Coordinating Commission for Postsecondary Education acting as the State Postsecondary Education Review Entity under federal law may be withheld from public review as investigatory records. Op. Att'y Gen. No. 94095 (November 28, 1994).

vii. In Op. Att(y Gen. No. 00037 (October 20, 2000) the Attorney General indicated that records received by the state Department of Education pursuant to its duties of examining persons for the purpose of issuing teaching and administrative certificates to qualified applicants could be kept confidential under ( 84-712.05(5). The Attorney General stated that the application records at issue were records developed or received as a part of an (examination,( and distinguished those records from the investigatory records at issue in *State ex rel. Nebraska Health Care Association v. Dept. of Health and Human Services Finance and Support*, 255 Neb. 784, 587 N.W.2d 100 (1998)

f. Appraisals and appraisal information and negotiation records

concerning the purchase or sale by a public body of real or personal property prior to the purchase or sale.

g. Personal information in records regarding personnel of public bodies other than salaries and routine directory information.

i. The Attorney General has indicated that employee evaluations from personnel files and lists of employees receiving bonuses may be kept confidential. On the other hand, fiscal records which would allow a determination of which public employees received a bonus must be revealed. Op. Att'y Gen. No. 90015 (February 27, 1990).

ii. Social Security numbers of state employees are not salaries or routine directory information which must be released under the public records statutes, and those numbers cannot be released under the State Personnel Rules. Therefore, state employees' social security numbers cannot be provided by the State Department of Personnel to the Department of Motor Vehicles for checks of the driving records of state employees. Op. Att'y Gen. No. 93042 (June 1, 1993).

h. Information solely pertaining to protection of the security of public property and persons on or within public property, such as specific, unique vulnerability assessments or specific, unique response plans, either of which is intended to prevent or mitigate criminal acts the public disclosure of which would create a substantial likelihood of endangering public safety or property, computer or communications network schema, passwords, and user identification names, guard schedules or lock combinations.

i. Much of the language of this category was amended and broadened by LB 276, passed by the Legislature in 2002.

i. The security-related records of the Lottery Division of the Nebraska Department of Revenue and those persons or entities with which the Division has entered into contractual relationships. This provision does not allow the Revenue Division to keep information regarding prize winners and payment of lottery contractors confidential.

j. Information from public utilities including personally identified private citizen account payment information, credit information, and customer lists. This provision was added by LB 108 passed by the Legislature in 1983. Under LB 1224, passed in 1994, public utilities must still furnish county attorneys, authorized attorneys and the

Department of Health and Human Services any information which they have detailing the names, addresses, social security numbers and employers of individuals for the purposes of collecting unpaid child, spousal and medical support payments. 1994 Neb. Laws LB 1224, ( 44 [codified at Neb. Rev. Stat. ( 42-358.08].

k. Records of publicly funded libraries which reveal the identities of patrons using the library's services. This exception was added by LB 108, passed by the Legislature in 1983.

l. Correspondence, memoranda, and records of telephone calls, related to performance of duties by a member of the Legislature in whatever form. This exception was originally added by LB 565 in 1983 as a direct result of an opinion by the Attorney General that correspondence and memoranda of state senators were public records. Op. Att'y Gen. No. 46 (March 14, 1983). The legislative history of LB 565 indicates that the provisions relating to the confidentiality of legislative phone calls originally pertained to the identity of the caller and not to the cost or the date of the call. Government, Military and Veteran's Affairs Committee Hearing on LB 565, 88th Nebraska Legislature, First Session (1983) at 44.

i. The Attorney General has indicated that ( 84-712.05(12) must be read to prevent public access to legislative phone records, and not necessarily to prevent access by other governmental officials under other statutes which separately grant access. Op. Att'y Gen. No. 94080 (October 14, 1994). Op. Att'y Gen. No. 92116 (October 8, 1992).

ii. Under Neb. Rev. Stat. ( 81-1120.27, any member of the Legislature may, at his or her sole discretion, designate any long-distance telephone call as sensitive or confidential in nature. If such a designation is made, any record of the call used in an audit shall contain only the date of the call and the cost of the call. No other disclosure with respect to that call can be required. "Sensitive and confidential" in this context means that either the member of the Legislature or the caller would reasonably expect that the nature or the content of the call would not be disclosed without the consent of the member and the caller.

iii. Under LB 509, passed in 1995, the lawful custodian of legislative correspondence, memoranda and records of telephone calls shall, upon approval of the Legislature's Executive Board, release those records, with the exception of records of telephone

calls designated as sensitive or confidential by individual legislators, to any person performing an audit of the Legislature. A member's correspondence, memoranda and records of confidential telephone calls related to the performance of his or her duties may be released to any other person only with the explicit approval of the member of the Legislature.

m. Records kept by public bodies which would reveal the location, character, or ownership of any known archaeological, historical, or paleontological site in Nebraska when necessary to protect such site from a reasonably held fear of theft, vandalism or trespass. This section does not apply to release of information for scholarly research, examination by other public bodies for the protection of the resource or by recognized tribes, the Unmarked Human Burial Sites and Skeletal Remains Protection Act, or the federal native American Graves Protection and Repatriation Act.

n. Records kept by public bodies which maintain collections of archaeological, historical, or paleontological significance which would reveal the names and addresses of donors of such articles of archaeological, historical, or paleontological significance unless the donor approves disclosure. This section does not apply to records needed to carry out the purposes of the Unmarked Human Burial Sites and Skeletal Remains Protection Act, or the federal native American Graves Protection and Repatriation Act.

o. Job application materials submitted by applicants, other than finalists, who have applied for employment by any public body as that term is defined in the Open Meetings Act at Neb. Rev. Stat. ( 84-1409. (Job application materials( in this context means employment applications, resumes, reference letters, and school transcripts. A (finalist( is any job applicant (i) who reaches the final pool of applicants, numbering four or more, from which the successful applicant is to be selected, (ii) who is an original applicant when the final pool of applicants numbers less than four, or (iii) who is an original applicant and there are four or fewer original applicants. This exception to disclosure was added in 1999 as a result of 1999 Neb. Laws LB 137, and amended in 2007 as a result of 2007 Neb. Laws LB 389.

p. Social security numbers, credit card, charge card or debit card numbers and expiration dates; and financial account numbers supplied to state and local governments by citizens.

i. This category was added to ( 84-712.05 by LB 276 which was passed by the Legislature in 2002.

5. Neb. Rev. Stat. ( 84-712.08 provides additional exceptions to the disclosure rules of the public records statutes if it is determined by a federal department or agency or other federal source of funds, services, or essential information that the provisions of the Nebraska public records statutes would cause the denial of funds, services, or essential information from the United States government which would otherwise definitely be available to an agency of the state. In such a case, the provision of the public records statutes shall be suspended only to the extent necessary to prevent denial of the federal funds, services, or essential information.

## **REQUESTS FOR ACCESS TO OR COPIES OF PUBLIC RECORDS; RESPONSE REQUIRED IN 4 BUSINESS DAYS**

Section 84-712 (4) provides that, upon receipt of a written request for access to or copies of a public record, the custodian of that record must provide one of the following three things to the requestor as soon as is practicable and without delay, but not more than 4 business days after actual receipt of the written request. First, the custodian may provide the requester with access to the record or copies of the record, if copying equipment is reasonably available. Second, if there is a legal basis for denial of access to or copies of the record, the custodian may provide the requester with a written denial of the records request together with the information specified in ( 84-712.04. (See Section G below). Third, the custodian may provide the requester with a written explanation of delay if the entire records request cannot, with reasonable good faith efforts, be fulfilled within 4 business days after actual receipt of the written request due to the significant difficulty or the extensiveness of the request. The written explanation of delay must include the earliest practicable date for fulfilling the records request, an estimate of the expected cost of any copies, and an opportunity for the requester to modify or prioritize the items within the request.

1. The provisions in ( 84-712 (4) were added to the Public Records Statutes as a result of LB 628, passed in 2000. 2000 Neb. Laws LB 628.
2. The legislative history of LB 628 indicates that the 4 business days referenced in (84-712(4) are determined by not counting the first day of receipt of the written request and counting the last day, so that a written request for copies of records received on Monday would require a response by Friday. Floor Debate on LB 628, 96th Neb. Leg., 2nd Sess. 11293 (Mar. 22, 2000)(Statement of Sen. Brashear).
3. Voluminous Records Requests. Section 84-712(4) states that an agency which has provided a records requester with an explanation of delay must state the earliest practicable date for fulfilling the records request. In the case of a voluminous records request, the legislative history of LB 628 makes it clear that the custodian of the records may take whatever time is needed under the circumstances to prepare copies of the records at issue. Such a response time,



for records requests such as (any and all records pertaining to( may be an (extremely long time.( Floor Debate on LB 628, 96th Neb. Leg., 2nd Sess. 11294 -11295 (Mar. 22, 2000)(Statements of Sens. Bruning and Brashear). Such a voluminous records request also does not require the custodian to abandon all other public duties in order to accommodate the request. Id.

4. Legal Advice. The legislative history of LB 628 makes it clear that a reasonable delay in providing copies of public records may be based upon the need to obtain legal advice from counsel as to the confidential nature of any documents or records at issue. Floor Debate on LB 628, 96th Neb. Leg., 2nd Sess. 11290 -11291 (Mar. 22, 2000)(Statements of Sens. Bruning and Brashear).

## **DENIAL OF ACCESS TO PUBLIC RECORDS; EXPLANATION**

A person denied rights with respect to public records has several remedies available, and those are set out in ( 84-712.03.

1. The individual can elect to file an action for relief by a writ of mandamus against the public officer who has custody of the record in the district court within whose jurisdiction that public officer can be served. This provision was added to the statutes by LB 505 passed in 1961.

- a. When a writ of mandamus is sought pursuant to ( 84-712.03, the party seeking the writ must first show: (1) that the party is a citizen of the state or other person interested in the examination of the public records, (2) that the document sought by the party is a public record as defined by ( 84-712.01, and (3) that the party has been denied access to the public record guaranteed by ( 84-712. State ex rel. Nebraska Health Care Association v. Dept. of Health and Human Services Finance and Support, 255 Neb. 784, 587 N.W.2d 100 (1998). Thereafter, if the public body holding the record wishes to oppose the issuance of a writ of mandamus, the public body must show, by clear and conclusive evidence, that the public record at issue is exempt from the disclosure requirement under one of the exceptions set out in ( 84-712.05 or ( 84-712.08. Id.

2. The individual can petition the Attorney General to review the matter to determine whether a record may be withheld from public inspection or whether the public body that is custodian of the record has otherwise failed to comply with the Public Records Statutes. Such a determination must be made by the Attorney General within fifteen calendar days after submission of the petition. If the Attorney General determines that the record may not be withheld or that the public body is otherwise not in compliance with the Public Records Statutes, the public body shall be ordered to disclose the record immediately or otherwise comply.

3. If the public body in question continues to withhold the record or remains in noncompliance, the individual seeking disclosure may: (1) bring suit in the trial court of general jurisdiction or (2) demand in writing that the Attorney General bring suit in the name of the state in the trial court of general jurisdiction for the same purpose. If the latter demand is made, the Attorney General shall bring suit within fifteen calendar days of its receipt. The requestor shall have an absolute right to intervene as a full party in the suit at any time.

4. In a suit filed under ( 84-712.03, the court has jurisdiction to enjoin the public body from withholding records, to order the disclosure, and to grant such other equitable relief as may be proper. The court shall determine the matter de novo, and the burden is on the public body to sustain its action. *Fourcloud v. City of Fremont*, 1993 WL 259351 (Neb. Ct. App. 1993)(Not approved for publication). The court can review the records in controversy in camera before reaching a decision, and the court may call on other persons, including the requestor, counsel, and necessary experts to review the records, subject to necessary protective orders.

5. Proceedings arising under ( 84-712.03 shall generally take precedence on the docket over all other cases and shall generally be expedited in every way.

6. Section 84-712.07 also provides that the provisions of the public records statutes may be enforced by equitable relief, whether or not any other remedy is also available. In any case where the complainant seeking access has substantially prevailed, the court may assess reasonable attorney's fees and other litigation costs reasonably incurred by the complainant against the public body which denied access to its records.

7. In a mandamus proceeding to compel production of records under the Public Records Statutes, affidavits from correctional officials that there were no records responsive to inmate's request other than those records previously provided to him were sufficient to establish a prima facie case that no such records existed, and inmate's failure to adduce contrary evidence entitled correctional officials to summary judgment. *Russell v. Clarke*, 15 Neb. App. 221, 724 N.W.2d 840 (Neb. Ct. App. 2006).

## **DENIAL OF RIGHTS REGARDING PUBLIC RECORDS; REMEDIES**

Section 84-712.04 provides that if a member of the public is denied access to a public record, he or she should receive the following information from the public body:

1. A description of the contents of the records withheld and a statement of the specific reasons for the denial including citations to particular statutes and subsections relied upon as authority for the denial correlated to specific portions of the records at issue.
2. The name of the public employee or official who made the decision to deny the request.
3. Notification to the requestor of any administrative or judicial right of review under ( 84-712.03.

Every public body shall maintain a file of all letters of denial of requests for records, and this file shall be made available to any person on request. This portion of the statute was initially added as a part of LB 86 passed in 1979.

## **VIOLATION OF THE PUBLIC RECORDS STATUTES; PENALTIES**

Any official who violates the provisions of the public records statutes shall be subject to removal or impeachment, and in addition, shall be guilty of a Class III misdemeanor. Under Neb. Rev. Stat. ( 28-106 (Cum. Supp. 2006), a Class III misdemeanor can be punished by up to three months in prison or a \$500 fine, or both. It has no minimum penalty.

## **ADDITIONAL PROVISIONS**

1. Section 84-712.01 (2) provides that the custodian of a public record of a county may charge a reasonable fee to members of the public for transmitting copies of public records held by that custodian from a modem to an outside modem. The fee in question must be based on the amortized portion of the cost of acquiring the computer equipment necessary to provide the service, and no county is required under the section to acquire new computer equipment or software to generate public records in a new or different form. This provision was added by LB 1275 in 1994 and amended by LB 628 in 2000.
2. Section 84-712.02 pertains to records of claimants before certain federal agencies. That section provides that when a claimant before the United States Department of Veterans Affairs requests that certified copies of a public record be furnished for proper and effective presentation of a claim, the officer in charge of such public records shall furnish a certified copy of that record free of charge.
3. Section 84-712.06 provides that, when portions of a public record may be properly withheld, segregable portions of the public record in question shall be provided to the public upon request after deletions of the portions which may remain confidential.

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